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10

11 UNITED STATES DISTRICT COURT
12 FOR THE CENTRAL DISTRICT OF CALIFORNIA
13 WESTERN DIVISION

14 IRA DAVES,)	Case No.: CV 08-07376 CAS (AGR _x)
)	
15)	
16 Plaintiff,)	JOINT REQUEST BY PLAINTIFF
)	IRA DAVES AND DEFENDANT
17 v.)	ATTORNEY GENERAL ERIC H.
)	HOLDER, JR. FOR PROTECTIVE
18 ERIC H. HOLDER, JR.,)	ORDER
ATTORNEY GENERAL,)	
)	
19 Defendant.)	
20)	

21 Plaintiff, IRA DAVES, and Defendant, Eric H. Holder, Jr., Attorney General of the
22 United States, by and through their respective counsel, Michael Cohen and Cindy
23 Cipriani of the Office of the U.S. Attorney, hereby agree as follows:

24 A. **Claw Back Provisions**

25 1. The parties recognize that the prosecution and defense of this action may
26 require each party to review and/or disclose large quantities of information and
27 documents through the discovery process. As a result, documents and images of
28 documents produced for inspection by, copied by, or delivered to another party,

1 inadvertently could include materials subject to privilege or other legally recognized
2 protection (hereinafter “privileged information”) and therefore not subject to disclosure
3 in discovery. Such inadvertent disclosure of privileged information or documents is
4 possible despite due diligence and reasonable care taken to protect privileged
5 information.

6 2. Absent this Protective Order, the effect of inadvertent disclosure of
7 privileged information is not certain, given some legal precedents and guidance dealing
8 with this issue, namely, whether privileges will be deemed to have been waived by the
9 inadvertent disclosure of privileged information.

10 3. Except as provided in Paragraph 4, before producing documents in response
11 to a discovery request, counsel for the producing party, or persons acting under his or her
12 direct supervision, shall examine the files containing documents to be produced and shall
13 screen all documents for privilege (or other legal protection), as allowed by law, and such
14 examination shall be performed with diligence, and with due regard for the likelihood that
15 the files contain privileged documents. Except as provided in Paragraph 4, at the time
16 of production, a producing party shall accompany its response with a privilege log
17 sufficient to meet the requirements of Federal Rule of Civil Procedure 26(b)(5). Provided
18 that a party has performed a privilege review and has produced a privilege log, the
19 producing party may request the receiving party to return any privileged documents
20 inadvertently produced with non-privileged documents, and the receiving party must
21 timely comply with the claw-back provisions stated in this Protective Order.

22 4. The parties recognize that the production and review of large collections of
23 electronic data may impose substantial burdens and delays. Notwithstanding the
24 requirements of Paragraph 3, the parties agree that, before production of electronic
25 information in response to a discovery request, counsel for the producing party may
26 identify collections of electronic data that are being produced without being reviewed for
27 privilege because such privilege review is unduly burdensome or would unduly delay
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1 response to the discovery request. For any information contained in a collection so
2 identified, the producing party may assert a claim of privilege as soon as practicable after
3 discovering the inadvertent disclosure or after receiving notice that the receiving party
4 intends to refer to, quote, cite, rely upon or otherwise use the information. In asserting
5 such a claim of privilege, the producing party shall provide information sufficient to meet
6 the requirements of Federal Rule of Civil Procedure 26(b)(5).

7 5. If the receiving party does not agree with the assertion of the privilege, it
8 shall notify the producing party within 21 days after the receipt of the claim of privilege.
9 The producing party may, after meeting and conferring with the receiving party as
10 required by Local Rule 26.1, move the Court for a determination of that claim. Any such
11 motion shall comply with Local Rule 37. If the producing party fails to make such a
12 motion within 21 days after receiving the receiving party's notice of disagreement with
13 the assertion, the claim of privilege shall be deemed waived.

14 6. Once a document or information has been identified as privileged in
15 accordance with Paragraphs 3 or 4, no party shall in any way refer to, quote, cite, rely
16 upon or otherwise use in any manner, any such document or its contents in any
17 proceeding unless and until the Court decides the issue or the producing party withdraws
18 the privilege claim, except the document may be submitted to the Court for in camera
19 review.

20 7. If the claim of privilege is upheld by the Court or if the receiving party
21 agrees with the claim, all copies of the privileged documents identified in accordance
22 with Paragraph 3 or 4 shall be returned to the producing party. If notes or records in any
23 form regarding such document(s) (other than as pertains to the existence of the privilege
24 document) exist, they shall be permanently destroyed, deleted or redacted. The receiving
25 party must certify in writing to the producing party that all privileged documents have
26 been returned or destroyed. If electronically stored information, including images of
27 documents, are produced on electronic media (*e.g.*, CD, DVD, USB drive, etc.) the
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1 producing party may demand the receiving parties to return or destroy all electronic
2 media containing the inadvertently disclosed privileged information, and shall provide
3 a replacement electronic media to the receiving parties at the producing party's expense.
4 The replacement electronic media shall be identical to the original electronic media
5 produced but for the privileged information.

6 8. Inadvertent disclosure of privileged information shall not be deemed to
7 constitute a waiver of the privilege. The parties agree that no party shall claim or
8 otherwise urge the Court to deem a privilege to have been waived solely on the basis of
9 inadvertent disclosure.

10 9. If a party receives information that appears on its face to be privileged
11 information inadvertently produced by another party, the receiving party shall notify the
12 producing party and shall not refer to, quote, cite, rely upon or otherwise use the
13 information until the producing party has had an opportunity to object to the use of such
14 information.

15 10. Recognizing that some documents in the parties' files may be privileged, if
16 a party allows a limited inspection of its files, no waiver of any applicable privilege
17 relating to a document is intended or implied by an agreement to allow limited inspection
18 of a party's files.

19 11. These claw-back provisions (A(1) through A(10) above) shall not apply to
20 any documents or communications that are subject to the parties' stipulation regarding
21 disclosure of otherwise privileged and confidential communications.

22 B. **Provisions regarding documents that are sensitive or protected by the**
23 **Privacy Act**

24 12. The parties have both requested that the other side produce sensitive or
25 confidential information. Plaintiff has asked Defendant, through the United States
26 Attorney's Office for the Southern District of California ("the USAO"), to produce certain
27 confidential personnel data or documents, some of which may contain information
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1 protected by the Privacy Act. Defendant has requested disclosure of Plaintiff's sensitive
2 medical, psychological or psychiatric treatment records. All of the foregoing is deemed
3 confidential by the parties. The signatories to this agreement ("the signatories") hereby
4 request that the Court order the parties to adhere to the following procedures and rules,
5 which will govern the use and handling of confidential information which either party
6 may disclosure or that the Court may order to be released:

7 13. Pursuant to 5 U.S.C. § 552a(b)(11), the parties reasonably believe some of
8 the information disclosed, i.e., confidential personnel information concerning various
9 former and current agency employees, may be discoverable under the standard provided
10 by Fed. R. Civ. P. 26(b)(1) and, therefore, those materials may be disclosed subject to a
11 protective order. See Laxalt v. McClatchy, 809 F.2d 885, 888-90 (D.C. Cir. 1987).

12 14. The parties agree their agreements herein, combined with the court's review
13 and execution of this Protective Order, are sufficient to protect the privacy interests of
14 any affected individuals. Id.

15 15. The confidential materials disclosed shall not be used for any purpose other
16 than preparation and trial of this case or in connection with proceedings concerning
17 settlement. For those purposes, the materials may be disclosed to the following persons
18 only:

- 19 a. The signatories and their staff; and
20 b. Parties, bona fide employees, agents, and experts of the signatories
21 for any of the parties, while assisting in accomplishment of the foregoing purposes, with
22 disclosure only to the extent necessary to enable them to perform same.

23 16. Unless the parties consent in writing to further disclosure, the signatories
24 shall not further disclose the information to persons or entities not listed in subparts a.
25 through b. above without first obtaining from the Court an Order.

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1 17. Subject to public policy and further court order, confidential documents may
2 be filed under seal only if the party seeking to file said documents applies for and obtains
3 a separate Court order from the Judge before whom the hearing or proceeding will take
4 place, with appropriate notice to opposing counsel. All private information concerning
5 Defendant's employees (such as Social Security numbers, home addresses and home
6 phone numbers) shall be redacted from any documents that are not filed under seal.

7 18. At the request of the opposing party, the parties agree to return any
8 documents containing confidential personnel or sensitive medical information disclosed
9 pursuant to this order or during administrative proceedings to the requesting party no later
10 than 30 days after the case is closed. The parties agree the Court may destroy any
11 confidential documents in the Court's possession immediately after the case is closed.

12 19. The parties understand and acknowledge that the provisions of this request
13 for protective order are subject to further Court order, based upon public policy and other
14 considerations.

15 20. Any party may at any time seek modification of this Protective Order by
16 written agreement or, failing agreement, by motion to the Court.

17 21. The undersigned counsel have authority to execute this Protective Order on
18 behalf of their clients.

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20 DATED: March 2, 2011

Cohen McKeon LLP

21 s/ Michael Cohen
22 Michael Cohen
23 Attorney for Plaintiff Ira Daves
E-Mail: cohen@cohenmckeon.com

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1 I certify that the content of this document is acceptable to Mr. Cohen and that I
2 have obtained authorization to affix his electronic signature to this document.

3 DATED: March 2, 2011

LAURA E. DUFFY
United States Attorney

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8 Counsel for Defendant
9 Attorney General Eric Holder
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